

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

D-4 COREY BAILEY,
D-6 ROBERT BROWN,
D-13 ARLANDIS SHY,
D-19 KEITHON PORTER,

Defendants.

MOTION HEARING

Wednesday, April 17, 2018

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APPEARANCES:

For the Government:

MARK BILKOVIC, ESQ.
TARE WIGOD, ESQ.
Assistant U.S. Attorneys

For the Defendants:

CRAIG DALY, ESQ
On behalf of Corey Bailey

JAMES FEINBERG, ESQ.
On behalf of Robert Brown

MARK MAGIDSON, ESQ.
On behalf of Arlandis Shy

STEVEN SCHARG, ESQ.
On behalf of Keithon Porter

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Ronald A. DiBartolomeo, Official Court Reporter*

1 *Theodore Levin United States Courthouse*
2 *231 West Lafayette Boulevard, Room 1067*
3 *Detroit, Michigan 48226*
4 *(313) 962-1234*

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Detroit, Michigan
Wednesday, April 17, 2019

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THE CLERK: Case Number 15-20652, United States of America versus Corey Bailey, Robert Brown, Arlandis Shy and Keithon Porter.

THE COURT: Good morning. Would you like state your appearances, Mr. Bilkovic?

MR. BILKOVIC: Good afternoon. Mark Bilkovic and Tare Wigod on behalf of the United States.

THE COURT: Welcome.

MR. S. SCHARG: Good afternoon, your Honor. Steven Scharg on behalf of Mr. Porter.

THE COURT: Welcome.

MR. FEINBERG: James L. Feinberg, attorney for Mr. Brown, who apparently isn't here yet.

THE COURT: Right. Thank you, Mr. Feinberg.

MR. DALY: Good afternoon, your Honor. Craig Daly on behalf of Corey Bailey.

THE COURT: Welcome.

MR. MAGIDSON: Good afternoon, your Honor. Mark Magidson on behalf of Mr. Shy who stands to my right.

THE COURT: Good afternoon. As it relates to Mr. Brown who is represented by Mr. Feinberg, we've been

1 advised that the -- that he is still in transit. He might
2 be expected to arrive in a half hour was the last word.

3 Mr. Feinberg has indicated that he's going to be
4 joining in the arguments made by other counsel, and we'll
5 give you the opportunity to speak on the issue if you
6 would like once your client gets here, but rather than to
7 keep everybody waiting while we wait for delivery of Mr.
8 Brown to this proceeding, I think we should go ahead,
9 especially in the light of the fact that for the most part
10 going to just join the argument made by co-counsel, is
11 that agreeable, Mr. Feinberg?

12 **MR. FEINBERG:** I'm not sure I'm in the
13 position to waive my client's presence, your Honor. I
14 know he was in Dickerson, which isn't a half hour away.
15 So if he's in transit, he should only be minutes away.

16 **THE COURT:** He's coming from where?

17 **MR. FEINBERG:** Dickerson.

18 **THE COURT:** He was in Milan.

19 **MR. FEINBERG:** He was in Dickerson yesterday.

20 **THE MARSHAL:** Milan.

21 **MR. FEINBERG:** I don't know why he would have
22 been separated, but I'm not position to waive his
23 presence, your Honor.

24 **THE COURT:** Well, you will be given the
25 opportunity to make any and all arguments that you wish

1 once he gets here.

2 In the meantime, we'll address the remaining
3 defendants and their counsel so we don't inconvenience
4 them any farther. Who will be arguing, Mr. Magidson?

5 **MR. MAGIDSON:** I'm going to start out, Judge,
6 and maybe one of the other counsel will have rebuttal
7 afterwards.

8 **THE COURT:** All right. Come up to the
9 podium.

10 **MR. MAGIDSON:** Please the Court, this is
11 defendants' motion for a new trial and or evidentiary
12 hearing based upon the jurors use of outside and
13 extraneous and material information that occurred during
14 deliberations. This information either caused actual
15 prejudice to the defendants, or if such information was
16 disclosed properly, it would have been a basis of removal
17 of that juror for cause.

18 The Supreme Court has held in *Duncan v Louisiana*,
19 that the right to a jury trial is fundamental to our
20 system of justice, and along with that, the court held
21 that a right to a jury trial presupposes an absolute right
22 to a fair and impartial jury. So that's what this issue
23 is about.

24 As this Court knows very well, there's a great
25 concern by the defendants and the government about the

1 jurors having opinions regarding street gangs in Detroit,
2 particularly in light of a multi-part, sensational news
3 article about this case that was published on the eve of
4 trial.

5 A questionnaire was prepared by both sides. We
6 spent a lot of time working out the questions for that
7 questionnaire, with the idea that it was going to be
8 reviewed by the parties, and prior to the actual selection
9 in many cases, we determined based on answer that were
10 given, many jurors were excluded. They had given opinions
11 and stated things on the questionnaire that showed bias,
12 and we stipulated to certain jurors being removed, and in
13 some cases the Court on its own saw certain things in the
14 questionnaire, and excluded jurors. So the questionnaire
15 was in effect a court order, and required honesty and
16 sincerity.

17 The Sixth Circuit Court of Appeals in English
18 versus Burgess discusses the consequences when a juror
19 fails to disclose material facts.

20 There, a juror in a CSC, criminal sexual conduct
21 case, failed to disclose that she had been sexually
22 assaulted when she was a child. There, like here, the
23 Court asked the juror whether she had any experiences that
24 is might affect her being an impartial juror, but she
25 never disclosed that she was a victim of a sexual assault

1 as a child.

2 The circuit court reversed the lower court
3 granting a habeas petition, and ordered the case remanded
4 to state court because the admission was material, and
5 bias could be inferred because it was deliberate. The
6 same occurred here.

7 In this case, a juror -- and we called her Juror
8 F -- reached out to defense counsel following the trial,
9 and disclosed that another juror -- we called her Juror
10 V -- had been dishonest in the jury selection process.
11 She had strong, negative opinions about gangs, stated it
12 was guys like this that were ruining the city, and ruining
13 her neighborhood.

14 Juror F stated that Juror V revealed that she
15 lived adjacent to the Red Zone, and used these extraneous
16 facts to unduly influence the jury.

17 Juror V commented that she was familiar with what
18 these types of guys did, unlike the suburban jurors who
19 did not know what was going on in the Detroit
20 neighborhood.

21 Now during the voir dire process, this Court
22 reminded all the jurors about the news coverage, and
23 whether anyone had been exposed to such coverage, and as
24 the Court recalls, there were jurors excused from the
25 panel who had either read the article or had knowledge of

1 the article or -- and who had opinions about gangs and
2 gang activities, and Juror V was present during that time,
3 and she remained silent. And the Court specifically
4 addressed her and asked whether she had heard all the
5 questions to the other jurors, and if there was anything,
6 quote, you want to bring to our attention? That was your
7 language. No, she answered.

8 The Court asked her directly, anything about the
9 nature of the case that raises concerns for you? No.

10 And the questionnaire is equally dishonest and
11 deceitful. The questionnaire asked if you ever had a
12 dispute with a gang member, and if she had any experience
13 with a gang, or any opinions or views as to why she could
14 not be objective, Questions 42 and 43. She answered no.

15 She answered no to having any opinion about rap
16 music, no anything about vulgar language, no about not
17 being -- about being objective about drug distribution, no
18 opinion about guilt or innocence. Question 50.

19 Based upon Juror F's affidavit, it's clear that
20 Juror V had lied and used this extraneous information,
21 information obtained outside the courtroom, outside the
22 evidence presented to unduly bully the other jurors.

23 Now based upon the affidavits of Juror F -- and I
24 should add parenthetically that following Juror F
25 contacting, another juror came forward as well. We call

1 him -- or this juror, Juror L.

2 Based upon these affidavits, there were a number
3 of instances where Juror V used or could have used
4 extraneous information that was used in the deliberations,
5 including she lived in the Red Zone or adjacent to the Red
6 Zone. She had witnessed evidence of Seven Mile Bloods
7 activity in and around her neighborhood, including gang
8 graffiti. She believed that people, quote, like
9 defendants, had ruined the neighborhood and ruined the
10 city. She had opinions, they had to go down, they had to
11 burn. These were her words.

12 She also refused to decide the case based upon the
13 evidence presented because, quote, these guys were here
14 for a reason, unquote. She used her personal knowledge of
15 the neighborhood to try to force and intimidate her will.

16 Further, both Jurors F and L made reference to the
17 fact that Juror V used outside knowledge that contradicted
18 the location of a strip club, and grant it, there was only
19 limited reference to where the strip club was, but the
20 fact is that was one example that they could think of off
21 the top of their heads, but there may have been others as
22 well, but this is what they could think of. This shows as
23 an example that she was using that knowledge.

24 Further, according to the these affidavits, it
25 appeared to Juror F that Juror V and another juror, Juror

1 C, had information about the case that was not part of the
2 evidence, was not presented in the case at all.

3 Later, Juror F, after the case was over, read the
4 Detroit News article that was referenced, and much of what
5 Jurors V and C stated in the jury room about the case came
6 in their opinion from that article, leading to her
7 reasonably conclude that they had read that news article.

8 Finally, at one point in the deliberations, a
9 marshal entered the room, as confirmed by both Jurors F
10 and L, and told them they -- the marshal told them they
11 could be heard outside, and basically keep it -- quiet
12 down.

13 No one asked for the marshal, and it appears that
14 the Court did not, or for the marshal to take any action.
15 And while the jurors in their affidavits said, well, they
16 didn't feel that affected by it, one of the jurors, Juror
17 L, commented that another juror seemed quieter the next
18 day.

19 So now the government asserts that Rule 606(b)(1)
20 precludes the Court from considering these affidavits, but
21 602(b)(2) of the Federal Rules of Evidence provides an
22 exception, and does permit jurors to present affidavits
23 and testify as to whether one, there was extraneous,
24 prejudicial information that was improperly brought to the
25 jury's attention, and or second, an outside influence was

1 improperly brought to bear on any juror, and we agree
2 that's the law, but we assert that these affidavits show
3 that there were outside influences brought mostly by Juror
4 V.

5 The fact is that -- the fact that there was a
6 disagreement or hostility in the jury room is of no
7 relevance. That's just way it is. It's part of the
8 deliberations.

9 There's a quote, laws are like sausages. It's
10 better not see them made. So goes with jury
11 deliberations, better not to see how it is done, because
12 there's, you know, fighting amongst themselves,
13 disagreements, and so forth. But here, there's more than
14 arguments and name calling. There were outside influences
15 and extraneous information that informed the jury during
16 deliberations, and that's the heart of this motion.

17 There's no doubt, according to the affidavits,
18 that a marshal came in the jury room and spoke to the
19 jury. There's a strong inference that one or more of the
20 jurors read the Detroit News article. This is information
21 that was outside the evidence, outside the influence.

22 Juror V did not disclose that she had lived
23 adjacent to the area, did not disclose that she was aware
24 of the Bloods, aware of the graffiti. These are things
25 that would have been excused for cause had this been

1 known.

2 She did not disclose that she had personal
3 knowledge about how the gangs ruined the neighborhoods,
4 and that she felt that they were ruining the city, and
5 this kind of dovetail into the government's first
6 witness -- I forgot his name -- Mr. Jones, who testified
7 that his neighborhood had been ruined by these guys. So
8 it sort of like corroborated the government's witness.

9 Now some of the allegations might be boarder line,
10 things that I've raised here. Some are in dispute. Some
11 I think are clear. So I believe that the Court needs to
12 err on the side of caution, and in this case the side of
13 caution is to make sure that these defendants were
14 provided a fair and impartial jury during this trial.

15 The relief that the court of appeals recently
16 ordered in Ewing versus Horton was remanded for a Remmer
17 hearing because without a hearing, how can we be sure, and
18 that's all at this point that's being sought.

19 The government wants to sweep these issues under
20 the rug. Let's -- what's done is done, but all the
21 defense wants is to shed light as to what occurred. If
22 the hearing showed nothing occurred, what's the harm? We
23 lost a few hours. We spent a few extra hours, but I
24 submit these gentlemen's life and their future is worth a
25 few more hours of our time. Thank you.

1 **THE COURT:** Okay. Thank you.

2 Mr. Daly, you indicated an intention to add to the
3 argument?

4 **MR. DALY:** I will wait for the government to
5 see if there's something that they say that needs to be
6 rebutted.

7 **THE COURT:** All right. Mr. Scharg?

8 **MR. S. SCHARG:** Yes, your Honor.

9 On behalf of Mr. Porter, I would like to
10 incorporate what Mr. Magidson said on behalf of Mr. Shy,
11 but I think it is crucial that a Remmer hearing be held in
12 this matter, otherwise our clients are being deprived of
13 their right to a fair trial under the Constitution and due
14 process. And once we found out -- once we were alerted
15 about the jurors' issues they were having, it's our
16 position that a Remmer hearing should have been conducted
17 immediately, and each one of the jurors being questioned
18 independently to inquire whether or not there were any
19 biases or prejudices due to our clients.

20 Your Honor, as Mr. Magidson said, I think it is
21 crucial to our clients since they are facing life
22 imprisonment, and not only for that reason, but for any
23 other reason that they need a fair trial, your Honor, and
24 due to the fact that we know what we know now from the
25 jurors that were interviewed by our investigator, it is

1 crucial that these individuals be interviewed
2 independently by this Court, and allow us the opportunity
3 to question them, and make sure that -- in my case Mr.
4 Porter -- was treated fairly, and had a fair trial in this
5 matter. Thank you.

6 **THE COURT:** Thank you.

7 Mr. Feinberg, we're still waiting on your client.
8 It is now 2:30, and we haven't seen him, but again, if you
9 want to offer comments now, you may.

10 **MR. FEINBERG:** I'll adopt what Mr. Magidson
11 and Mr. Scharg said.

12 **THE COURT:** All right. I'm still
13 anticipating giving you the opportunity to speak more if
14 you wish.

15 **MR. FEINBERG:** I understand.

16 **THE MARSHAL:** Mr. Bilkovic?

17 **MR. BILKOVIC:** Where do I begin? I know the
18 Court knows it, because both sides have been clear in
19 their briefs, but I want to read it in the record.
20 Federal Rules of Evidence 606(b), during an inquiring into
21 the validity of a verdict or indictment.

22 During an inquiring into the validity of a verdict
23 or indictment, a juror may not testify about any statement
24 made or incident that occurred during the jury's
25 deliberations the effect of anything on that juror or

1 another juror's vote or any juror's mental processes
2 concerning the verdict or indictment. The Court may not
3 receive a juror's affidavit or evidence of a juror's
4 statement on these matters.

5 Two exceptions that potentially the defense argues
6 here, one, a juror may testify about whether extraneous,
7 prejudicial information was improperly brought to the
8 jury's attention, or an outside influence was improperly
9 brought to bear on any juror.

10 Contrary to what Mr. Magidson suggested -- and
11 although as we cite in our briefs -- sometimes courts are
12 tempted to order hearings even when they are not required.
13 This is that case. It's not good enough for them to say
14 for everybody to feel better about this, even though the
15 law doesn't require it, let's hold a hearing. That's not
16 what the law is. The law is very, very clear.

17 Mr. Scharg mentioned that this should have been
18 brought to the Court's attention immediately. They didn't
19 bring to the Court's attention immediately. They had the
20 juror's affidavit December 15, 2018. They waited two
21 months after that to file this motion.

22 So despite their claim they wanted this done
23 expeditiously, and this should have been addressed
24 immediately, the actions in this case of defense counsel
25 don't bear that out.

1 I'm going to start not in the order of how my
2 brief is outlined. I'm going to start in reverse to
3 demonstrate why this Court and other courts are warned not
4 to interfere with jury verdicts months or years later, and
5 more importantly, why courts cannot use juror affidavits
6 to do that.

7 Both of the these jurors in their affidavits,
8 different ways, indicated when they were hung, they sent a
9 note indicating that they were hung. They were brought
10 into the court, and this Court, you, Judge Steeh, told
11 them that they had to reach a verdict of guilty or not
12 guilty.

13 Exhibit B from Juror L, when we were brought back
14 into the courtroom, we were told we had to go back to
15 deliberate and reach an unanimous verdict, either guilty
16 or not guilty.

17 Absolutely incorrect. I'm not going to go through
18 what the Court instructed them, but we know, because we
19 all have the transcript, and the Court in its instructions
20 made it very clear that the jury did not have to return a
21 verdict of guilty or not guilty, and the Court instructed
22 the jury that in the end, your vote must be your own. It
23 is important for you to reach unanimous verdict, but only
24 if you can do so honestly and in good conscience.

25 Those these two jurors now coming forward, and

1 according to defense have these great claims that there
2 were improper things that went on in jury deliberations,
3 show with their affidavits why courts don't entertain
4 this. They were both absolutely wrong about what this
5 Court instructed the jury when the jury was hung.

6 So let's go to another example. The defense has
7 had access to these jurors, at least Juror F since
8 December of 2015. The case that defense counsel cites and
9 attaches to the brief, lays out an affidavit that did
10 contain extrinsic evidence. It talked about how jurors
11 got on the internet, and they brought in Facebook pages,
12 and they discussed the specifics about outside influences,
13 and what happened based on additional research.

14 The defense didn't do that in this case. They had
15 months to do it. They offer up that Juror V knew where
16 the 007 strip club was, a fact that totally, totally,
17 totally insignificant at trial.

18 But what didn't the defense do? In December, in
19 January when the affidavit was notarized, in February when
20 they filed their motion, in March after getting our motion
21 and seeing the issues we were raising, what didn't they
22 do? To this point they have not let you know what fact it
23 is or facts that Juror F claims were outside influences
24 that were contained in the Detroit News article that were
25 not admitted at trial, and I submit to the Court there's

1 one of two reasons for that: One, Juror F was wrong, just
2 like she was wrong about what you instructed her, and that
3 the fact that she thought was in the Detroit News article
4 and not mentioned at trial was brought up at trial, or
5 number two, that fact that she is aware of is so
6 insignificant that they chose not to put it in their
7 motion, and not to put it in the affidavit because it
8 would have no bearing on this Court's decision.

9 I asking to you use your common sense, your Honor.
10 You have four defense lawyers --

11 **THE COURT:** Let me interrupt you for just a
12 minute.

13 We do have Mr. Brown now with us.

14 **DEFENDANT BROWN:** How you doing, sir?

15 **THE COURT:** Very fine.

16 **DEFENDANT BROWN:** How is everyone in the
17 courtroom doing?

18 **THE COURT:** Okay. Mr. Feinberg, are you all
19 set?

20 **MR. FEINBERG:** Yes, your Honor.

21 **THE COURT:** You may continue.

22 **MR. BILKOVIC:** So the same defense attorneys
23 that filed a motion, join a motion, claimed that there was
24 outside influence because this juror knew the location of
25 the 007 strip club. When they get this information from

1 the same juror, and she tells them, Juror V talked about
2 facts. I didn't remember hearing those facts at trial. I
3 then read the Detroit News article, and then I realized
4 that's where she got those facts. They want you to
5 believe that not one of them asked her, what fact? What
6 did you hear? Did you hear about Corey Bailey having been
7 charged with the Calloway murder? What did you hear? For
8 some reason that is not in here, and what is not in this
9 affidavit is just as important, if not more important,
10 than what is in the affidavit.

11 So let's move onto extrinsic evidence. Extrinsic
12 evidence is not a juror using their own personal
13 knowledge. Every one of these defense lawyers knew that
14 this juror, Juror V lived in Detroit for 51 years. They
15 knew that her brother-in-law was retired from the Detroit
16 Police Department. They knew that her son was currently
17 working for the Detroit Police Department. They knew
18 their brother was murdered in 1991. They knew that she
19 had a cousin killed in 2017. Knowing all of this, it
20 should not come as a surprise to anybody that this juror
21 is aware of gang activity.

22 One of the things that we cite in our brief was
23 the Warger case that talks about voir dire, one of the
24 principal cornerstones in weeding out bias.

25 The six attorneys -- I believe it was six -- at

1 least five that was present when this juror was seated in
2 the box, did not ask her one single question. Not one.
3 The fact that a juror lives in Detroit, and as a result of
4 that, 51 years old, relatives that are in the police
5 department, the fact that that juror is aware of what --
6 of gang activity, the fact that she is aware of graffiti,
7 the fact that she lived allegedly in the Red Zone, that's
8 not what the courts are talking about when the talk about
9 extrinsic evidence.

10 I identified multiple cases, and the courts says
11 sometimes defense lawyers leaves jurors like that on there
12 because they can do exactly what they are now complaining
13 about. They can educate other jurors about things that
14 those other jurors might not know about. Courts are
15 clear, there's nothing wrong with that. There's nothing
16 wrong -- one of the cases that I cited to the Court -- an
17 emergency room doctor that talked to the other jurors
18 about evidence relating to somebody getting shot and what
19 would have happened to blood flow when that happened in
20 their experience. They knew that was an issue, and they
21 left that person on. There's nothing wrong with that. So
22 there is no extrinsic evidence that requires a hearing in
23 this case.

24 You talk about the marshal knocking on the door
25 and going in, and telling them to quiet down. Case law is

1 clear, neutral intrusion, that's not anything that results
2 in prejudice. And one of the things that I would like to
3 know -- because it would add to the argument that I would
4 make, but despite requests, we have not been given
5 information as to who these jurors are -- Juror F's
6 affidavit says, it didn't bother her. Juror L, in his
7 affidavit, says it didn't bother him, and Paragraph 9 he
8 does indicate there's another juror who was called, and I
9 don't know who that is. But if that's a Juror F, again
10 Juror L is wrong, because if it is Juror F, Juror F said
11 that she was not bothered by that.

12 There's been no allegation that if that entrance
13 did happen, that anything was said that affected anybody,
14 anything was said by the marshal to hurry deliberations
15 along where the Court could look at that intrusion that
16 might have affected the jury verdict.

17 If you look carefully at the jury questionnaire,
18 the jury questionnaire -- and if you look carefully at the
19 motion, things that defense counsel is complaining about
20 that warrants them a new trial -- that she showed bias
21 against gang members, and as Mr. Magidson put in his
22 motion, and said in court today, that Juror F said, quote,
23 they must burn. Juror V said that they must burn. That
24 is nowhere in Juror F's affidavit. Mr. Magidson said it
25 here, and put it in his motion. It is nowhere in the

1 affidavit, and I would submit to the Court that if based
2 on the evidence that these jurors heard, that juror, any
3 juror, felt defendants like these -- the evidence has
4 shown defendants like these, yeah, these are the people
5 that are doing this. They are guilty of these crimes, and
6 we're going to find them guilty -- there's nothing wrong
7 with that.

8 Again, her reliance -- defense counsel indicates
9 her reliance on facts are not in evidence. There's no
10 evidence of that in these allegations other than personal
11 knowledge that she had growing up 51 years in Detroit that
12 they didn't bother to ask her about for whatever reason.
13 They chose not to ask her about those questions.

14 So basically what they want to do is have a
15 hearing to do the things that if they had a valid claim
16 already would have been done, submit an affidavit from
17 these jurors that was complete and lays out specific facts
18 that were not evidence at trial, that would be prejudicial
19 if other jurors knew about them. Facts from this Detroit
20 News article, instead of mentioning that she knew where
21 the 007 strip club was.

22 So if I'm on a jury, and I live in Ann Arbor, and
23 somebody says that Spots Wings is on such a location, and
24 I say no, it's not. It's somewhere else, that's improper?
25 That's not improper. Juror are allowed to use that

1 experience.

2 So based on all the law that you have in this
3 case, based on the very clear direction from the Court of
4 Appeals, from the United States Supreme Court, there is no
5 evidence of extrinsic influences or other influences that
6 these affidavits have borne out that you can even look at,
7 because you have to start there. What in these
8 affidavits, if anything, am I allowed to look at, and the
9 courts and the rule of evidence makes it very clear, very,
10 very limited information, and that limited information is
11 not what these affidavits go to, and as a result, I'm
12 asking the Court to deny the defendants' second motion
13 for a new trial.

14 **THE COURT:** All right. Thank you, Mr.
15 Bilkovic. Mr. Daly?

16 **MR. DALY:** Thank you, Judge.

17 I want to address my arguments in two ways; the
18 first is a response to what the government has said, and
19 then I want to spend a little bit of time emphasizing why
20 we should have a evidentiary hearing, why that is
21 essential in this particular case.

22 So the government correctly read the rule, and we
23 know what the rule says. It's no secret that the defense
24 is looking at the two exceptions that were read into the
25 record about extraneous information or influence that was

1 brought to the jury's attention.

2 So I got the feeling that when the government was
3 talking that there wasn't any law to support what we were
4 saying, that's not correct. So the law is there in the
5 form of the rule, and in the form of Sixth Circuit cases
6 that we cited.

7 One of the government's complaints is that we
8 waited too long. Well, in this case there was a
9 semi-anonymous jury. We didn't know who the jurors were.
10 We couldn't reach out and touch them or contact them. We
11 had to wait until they contacted us.

12 The time of the delay really is minimal. It's a
13 few months. The verdict came in at the end of August. In
14 the fall, late fall, early winter is when the one juror
15 called me, and was clearly upset about what had happened,
16 and some of the words that she used and that are in the
17 affidavit is that she described the deliberations as
18 misleading, disturbing, things of that nature. So she was
19 volunteering that information to us, and then it was put
20 into the form of an affidavit.

21 So that government complaint about the delay is
22 really falls on deaf ears because one, it was not very
23 long, and two, we had to rely on the jurors to come
24 forward in order to speak with us. So that's not really
25 important consideration for you at all.

1 I think the government is correct when they go
2 back to the affidavits, and they sort of sort through the
3 difference between what would fall into the exceptions,
4 and what falls into the first category which would be not
5 be a sufficient basis for a new trial.

6 For example, they correctly point out that their
7 interpretation of your instruction after they indicated
8 that they were hung, made them believe that there were
9 only two possible verdicts, guilty or not guilty, that
10 there was no such thing of a hung jury. That could not be
11 the basis of a new trial.

12 What we did though, we didn't want to parse out
13 all the information that they were giving us. We wanted
14 to put it all there to make as complete record as we could
15 with the affidavits. So there are certain things in there
16 that would not qualify for a new trial. I think it's
17 obvious. It's not difficult to sort through and figure
18 out what is what.

19 The news articles which came out shortly before
20 trial, if it was a passing article, like on the back page
21 of the News, and it was like a few paragraphs, the
22 government may have a position. This was I believe -- and
23 I don't remember at this point -- an eight part expose.
24 It was very extensive. It had a lot of information in it.

25 That document, that news article, we will submit

1 to you and to the government -- they've seen it, we've all
2 seen it, the defendants have it, and we will attach that
3 as a supplemental exhibit for you to see -- once you read
4 it, you will see that there is, in fact, a lot of
5 information in there that was not disclosed during the
6 trial.

7 I don't remember everything in it, but one of my
8 guesses is that they made have had information about
9 another homicide that Mr. Bailey was allegedly involved
10 in, and the government decided not to introduce it. So
11 that would be something that we would be looking for, but
12 we can that for you with the Court's permission to point
13 out why this news article was so devastating.

14 And the other thing that is extraneous that Mr.
15 Magidson pointed out is the fact that this juror, Juror V
16 lived near -- just east of Gratiot, real close to the Red
17 Zone that was identified as the area that the Seven Mile
18 Bloods operated in.

19 Now the government's position I find somewhat
20 speculative to say the least that if you lived in Detroit,
21 number one, you know about gangs, and number two, you have
22 a particular feeling about it. The difference is -- and
23 this is just common sense -- the closer you are to the
24 activity, the more response you are going to have to it.
25 If you're close to the Red Zone, and you're seeing

1 tagging, and you can see if driving with your own eyes
2 down Gratiot, what's going on, or you hear because you're
3 in the neighborhood. That's a big difference than living
4 in the high rise on the river, and you never have contact
5 in the neighborhood.

6 So there's lots of people that live in Detroit
7 that don't have contact with gangs, and don't even know
8 that there are gangs on the east side, gangs on the south
9 side in different areas of Detroit. They just don't know
10 it. When you say it, they say, I didn't know there were
11 gangs in Detroit. We thought that was out in Los Angeles
12 or something. So that argument doesn't carry much weight
13 either.

14 The other thing that the government tried to do,
15 they tried to shift on to us what they are claiming is our
16 failure to interrogate this juror. On its face, it looks
17 like it would have some validity, except you've got to
18 look at it in the context of what happened.

19 This juror came onto the panel at the end. Now
20 she sat there and listened to all of the questions being
21 asked by the lawyers to other jurors and you, and what you
22 said to this juror was, is there anything that you heard
23 by any questions by all of the other lawyers and by myself
24 that you need to respond to, and bring to our attention,
25 and we do that because it's a waste of time for us to go

1 back and ask each juror that gets up in the box all of
2 those questions. We rely on the jurors to listen. In
3 fact, I believe you probably told them to listen to all of
4 the questions.

5 So what we are doing, we're relying on the jurors
6 to bring to our attention information that they know they
7 should disclose. We are relying on them to be honest to
8 come forward by asking the general question, is there
9 something we need to know.

10 She knew. She should have told us that she lived
11 near there. She knew that she should have told us that
12 she had particular feelings about gangs. She knew that
13 she should have told us that she was going to conclude
14 that those gang members were here for a reason, all of
15 those things that violates our client's right to be
16 presume innocent for example.

17 Those are things that we had to rely on her to
18 bring to our attention, and she didn't, and that's what
19 makes this a particularly meritorious issue, not because
20 we didn't do our job, but because she didn't come forward
21 with that information.

22 The other thing that I want to talk about is why
23 we need an evidentiary hearing. The government is correct
24 we cannot win this motion on the affidavits. We just
25 can't. An evidentiary hearing is essential for us to make

1 out our case. An evidentiary hearing is essential to the
2 government so that they can quit complaining about not
3 having an opportunity to speak to the jurors and find out
4 exactly what happened; so they can question the jurors in
5 open court. It would be helpful to them as much as to
6 you.

7 But most importantly it is essential for you to
8 hear the jurors. You have to see them. You have to look
9 at them in the eye. You have to make a credibility
10 determination about whether or not they are being truthful
11 and accurate in what they are saying, and you are the only
12 one that can do it, and you can only do it through a
13 hearing.

14 And so when the government says in general, or in
15 the pleadings, we don't like to drag jurors in because
16 it's a form of harassment, that's not this case at all,
17 because the jurors voluntarily came to us. We're not
18 dragging them in here under circumstances that they don't
19 want to be here. In their affidavits they say explicitly,
20 I'm prepared to come into court under oath and testify so
21 they are willingly coming to court. Now maybe Juror
22 Number -- or Letter V maybe somewhat reluctant, but that's
23 one juror. One juror. So that argument falls flat as
24 well.

25 The other part about the evidentiary hearing

1 that's important is that when we filed our brief, and we
2 talked about the evidentiary hearing in response to the
3 government's position, they cited everything outside the
4 Sixth Circuit, but the Sixth Circuit says is that when
5 there is a prima facie case, the affidavits serve as the
6 prima facie case. The court has -- and the word they
7 use -- is duty -- there's a duty or an obligation on
8 behalf of court to investigate these types of allegations
9 when we file the affidavits.

10 If we didn't file the affidavits, there wouldn't
11 be a playable plain for us. So that's the only purpose of
12 the affidavit, isn't to be a final statement about what we
13 expect.

14 But what you heard from the government basically
15 is a factual dispute. I mean, basically what they said to
16 you is well, we don't agree with this, and we don't think
17 you should infer from that, this, and defense says this,
18 and we say that. The purpose of the evidentiary hearing
19 is for us to figure out what are the facts that we want to
20 present to you in dispute, and let you decide. Let you
21 decide whether or not in this case the defendants were
22 denied a right to fair trial through this jury, and
23 there's more than sufficient and specific facts that we
24 set forth, Judge, that would allow you to grant the
25 hearing, and I do think under the circumstances, Judge,

1 you have an obligation. I think you have an obligation to
2 the system, to yourself, to the government, to the
3 defendants to conduct a hearing.

4 **THE COURT:** All right. Thank you, Mr. Daly.
5 Mr. Feinberg?

6 **MR. FEINBERG:** Yes, your Honor.

7 I guess for the record, I was mistaken when I
8 thought I saw Mr. Brown in the court because when he came
9 in, he told me he had just arrived.

10 **THE COURT:** All right.

11 **MR. FEINBERG:** I agree with Mr. Magidson and
12 Mr. Daly with their arguments, but I think one of the real
13 key issues is while we were able to get affidavits from
14 Jurors F and L, we did not attempt to seek Juror V to find
15 out whether or not the allegations that the other two
16 jurors were alleging came from her, did come from her in
17 order that find out her credibility to determine whether
18 or not there were improprieties going on in the jury room
19 about her telling the rest of the jurors her own -- her
20 own feelings based on her growing up in the area.

21 Again, Mr. Daly indicated the reason she was not
22 asked any questions, wasn't because there weren't any
23 questions to ask her. This Court indicated to her when
24 she came on -- because they were all sitting in the
25 courtroom while the voir dire it was going on -- whether

1 or not there was anything that she heard or knew that she
2 is responsible to report to us? She said no, meaning that
3 without asking whether or not she lived in the close
4 proximity of the Red Zone, she indicated no. Whether or
5 not she gained any information, or knew of any information
6 about the gangs in that area that she was not suppose --
7 or if she acknowledged, she would have been excused. The
8 fact that she didn't mention that indicated that she had
9 no knowledge, but if she gave that knowledge to the jury
10 during deliberation that we should have known that she was
11 capable of knowing, she would not have been on the jury.

12 Again, I agree with Mr. Daly when he said the only
13 way to really determine if there was really any
14 impropriety is to have a evidentiary hearing. The
15 defendants are facing -- Mr. Brown is facing a lot of
16 time, an enormous amount of time up to life imprisonment
17 according to the probation officer. To take another week,
18 two weeks, even a month to make a final determination of
19 whether or not there was any jury impropriety is no skin
20 off the Court's nose or the government or the attorneys is
21 enormously meaningful to the defendants, and I would
22 concur that the Court should grant and conduct the
23 evidentiary hearing.

24 **THE COURT:** Okay. Thank you.

25 **MR. S. SCHARG:** May I add something?

1 **THE COURT:** Sure.

2 **MR. S. SCHARG:** Your Honor, we know that this
3 had to be so severe for, as Mr. Daly said, the jurors, we
4 didn't go looking for them. They contacted us. So for
5 them to contact us, we know the issues they were
6 experiencing in the jury room had been to be pretty,
7 pretty horrible for the jurors to have to feel that way in
8 order to call the defense attorneys about the issues they
9 were experiencing, because this issue doesn't happen all
10 the time. This is a very rare instance, and these jurors
11 contacted us. They explained to us, explained to Mr.
12 Daly, the issues they were experiencing in the jury room,
13 which affects these defendants and their right to be free,
14 and have a fair trial in this matter.

15 We spent 10 weeks in trial at least, and longer
16 that the case was going on, for quite a long time, almost
17 two years, and what is two or three hours? How can that
18 two or three hours hurt to us have a hearing to see what
19 occurred in the jury? What is two or three hours when we
20 spent two years and 10 weeks in trial?

21 And there's been testimony today by Mr. Magidson,
22 Mr. Daly, as well as myself and Mr. Feinberg, and you have
23 the government making their positions in this matter, and
24 arguing about what these affidavits said and what they
25 didn't say. Well, let's bring the jurors back. Let's get

1 the real version of what occurred. Let the jurors explain
2 to you why they contacted us, and what they were
3 experiencing in that jury room, and to see whether or not
4 these gentlemen actually had a fair trial or not.

5 So respectfully, we would ask you to consider an
6 evidentiary hearing in this matter.

7 **THE COURT:** Thank you, Mr. Scharg. Anybody
8 else on the defense side? Mr. Bilkovic?

9 **MR. BILKOVIC:** Thank you, your Honor.

10 Your Honor, Mr. Scharg says that this is an
11 unusual situation. This is not an unusual situation. It
12 happens all the time, which is why there is a court rule
13 on it, by there is rules of evidence on it, and why there
14 are thousands of cases on it that warn courts not to do
15 this.

16 I'll touch on the timing briefly of these
17 affidavits because I actually got something wrong. Mr.
18 Daly indicated that that's really not an issue. I'm not
19 the one that raised it. Mr. Scharg did, but interestingly
20 enough, the first juror they talked to -- and I apologize
21 for getting this wrong earlier -- the first juror they
22 talked to was Juror F. It wasn't until after they talked
23 to Juror F that they found out about another juror, and
24 then they talked to that juror, Juror L. Juror L's
25 affidavit is dated December 15, 2018. Juror F's affidavit

1 is dated January 15, 2019. So the second juror that they
2 talked to signed an affidavit December 15th, and we know
3 that that juror was talked to after they talked to Juror
4 F, which means they talked to Juror F before
5 December 15th, and what do we still don't have after Mr.
6 Daly getting up again, and Mr. Scharg getting up, and Mr.
7 Feinberg getting up? They still will not tell you, and
8 have not told you what fact did this juror say that Juror
9 V brought up that she believes was from the Detroit News
10 article.

11 This is their opportunity to do it. They have to
12 convince you that there is extrinsic evidence that
13 requires a hearing. They just can't say there's extrinsic
14 evidence, but we're not going to tell you. They have to
15 tell you because you have to make a determination as to
16 whether it's evidence that could prejudice a jury, and the
17 fact that they told you about the 007 strip club not in
18 one, but both affidavits and refuse to tell you what this
19 fact is that was allegedly contained in the Detroit News
20 article should be glaring to this Court.

21 They want to go on a fishing expedition. They
22 want to bring these two jurors in, and hope that it will
23 prompt you to then harass Juror V, and bring her in.

24 Mr. Daly said the government doesn't want you to
25 harass the jurors. I don't want -- the government, that's

1 not our position. That is the United States Supreme
2 Court's position. Those are the Court of Appeals opinions
3 and their positions that this court should not engage in
4 that type of behavior.

5 They have had since at least December 15th to
6 follow up with this juror and say, you know what? There
7 was this prejudicial article that appeared in the Detroit
8 News, a six piece article. You made an allegation that
9 you read that article, and that there was something in
10 there that was discussed during trial. We need to know
11 what that is. That was not done, and this Court needs to
12 ask why, and again, the answer is obviously. It's either
13 insignificant, or it simply didn't happen.

14 She was wrong, just like she was wrong about what
15 this Court instructed, and Mr. Daly conceded that what the
16 jurors thought you had told them is not the basis of a new
17 trial, but again, the reason why courts don't allow this
18 is Juror Affidavit L doesn't say that's what he thought
19 you said. He said we were told we had to go back to
20 deliberate and reach an unanimous verdict, either guilty
21 or not guilty, and we all left with the impression that
22 saying hung is not an option, but he puts in his affidavit
23 that we were told by you, Judge Steeh, we had to go back
24 and find them guilty or not guilty.

25 When it comes to the personal knowledge, again of

1 the juror, you don't look at this in a vacuum. I'm sure
2 there are jurors that have moved here from other cities,
3 and live in million dollars high rises, or \$500,000 high
4 rises that have been here for a few months that may not
5 understand the crime problem in the city of Detroit, and
6 may not understand gangs, but this juror in her affidavit,
7 Juror V, let the defense attorneys know that she's been in
8 Detroit for 51 years, and oh, by the way, her
9 brother-in-law retired from the Detroit Police Department,
10 and oh, by the way, her son is currently a Detroit Police
11 Officer.

12 They didn't ask one question in follow up to that,
13 and the Court has to assume that there's a strategy reason
14 they chose not to do that. It's certainly in a jury
15 selection that took three days, a trial that took 10
16 weeks, the reason certainly is not because they didn't
17 want to waste the jury's time ask additional questions. I
18 mean, this trial lasted 10 weeks instead of because five
19 weeks because of how many times the same question was
20 asked.

21 I would have to go back and look at it, but I
22 would venture to guess that that juror was the only juror
23 that was impaneled on this jury that not one of the
24 defense lawyers asked one question to. So for whatever
25 reason they had for not doing that, that doesn't give them

1 a license to come in now and say, you know what? She bias
2 against gangs, and lived near the Red Zone, so that
3 entitles us to a hearing and potentially a new trial.

4 I would also submit, I don't believe I mentioned
5 it in our brief, but in the Warger case, the court
6 specifically held that Rule 606(b) precludes a party
7 seeking a new trial from using a juror's affidavit of what
8 another juror said in deliberations to demonstrate other
9 juror's dishonesty during voir dire. That the United
10 States Supreme Court opinion.

11 So again, we come back to basically what this is
12 about is, Judge Steeh, months later, couple of the jurors
13 were upset about some things that happened. So we kind of
14 want another hearing because we want another shot at this.
15 The law doesn't allow that. You shouldn't grant it.

16 Thank you.

17 **THE COURT:** All right. I appreciate the
18 presentations on both sides. I'm assuming there are no
19 other remarks. The Court will take the matter under
20 advisement, and issue a written opinion as soon as
21 possible. Thank you.

22 **DEFENDANT BROWN:** Thank you, Judge Steeh.

23 **THE COURT:** Okay. You're welcome.

24 (Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Ronald A. DiBartolomeo
Ronald A. DiBartolomeo, CSR
Official Court Reporter

December 3, 2019
Date

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